Israel's Airstrike on Syria's Al-Kibar Facility: A Test Case for the Doctrine of Pre-emptive Self-Defence?

I.INTRODUCTION

Just before 1am on 6 September 2007 Israeli fighter jets attacked a target near Al-Kibar in north-eastern Syria, before returning safely to base. For several weeks very little information was revealed about this mysterious incident, with Israel and the United States refusing to comment while Syria complained only of a breach of its airspace by Israel. Yet even after further details emerged confirming that Israel had destroyed a facility in the raid, Syria continued to downplay the incident and the international community's reaction was minimal. This lack of international criticism was remarkable, particularly given that past military action by Israel has invariably been the subject of rigorous scrutiny by the international community.[1]

Subsequent International Atomic Energy Agency (IAEA) investigations discovered uranium particles at the Al-Kibar site, lending independent support to earlier US claims that Israel's target had in fact been a secret Syrian nuclear facility being constructed with North Korean assistance.[2] While Syria continues to deny that the site was used for nuclear purposes the IAEA's findings have added credibility to comparisons between the Al-Kibar raid and Israel's attack on Iraq's Osirak nuclear reactor in 1981.[3] In the Osirak incident Israel

[1] For debate over the 2006 Israel-Hezbollah conflict, see for example, UN Press Release SC/8776, 14 July 2006, UN Press Release SC/8781, 20 July 2006, UN Press Release SC/8789, 30 July 2006, SC Res 1701 (2006). On the 2003 Israeli airstrike on an alleged Islamic Jihad training camp in Syria see UN Press Release SC/7887, 5 October 2003, UN Press Release SG/SM8918, 6 October 2003. On the 1981 Osirak incident see UN Doc S/14510, 8 June 1981, SC Res 487 (1981), SC 2280th meeting (1981), SC 2288th meeting (1981).

[2] See IAEA, *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic*, GOV/2008/60, GOV/2009/36, GOV/2009/56, GOV/2010/11. Syria is a state party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and concluded a NPT Safeguards Agreement with the IAEA in 1992, which requires it to report to the IAEA any plans to construct a nuclear facility.

[3] For more on the Osirak incident see UN Doc S/PV/2280 (1981) 53-55; William T Mallison and Sally V Mallison, 'The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?' (1982) 15 Vanderbilt Journal of Transnational Law 417; Anthony D'Amato, 'Israel's Air Strike Upon the Iraqi Nuclear Reactor', (1983) 77 AJIL 584.

justified its actions by explicitly claiming a right of anticipatory self-defence.[4] This was rejected by the international community, with the Security Council unanimously condemning the Israeli raid as a 'clear violation of the Charter of the United Nations and the norms of international conduct'.[5] Twenty six years after Osirak, the attack on Al-Kibar - dubbed Operation Orchard - appears to have been another example of a pre-emptive Israeli strike on a nuclear facility in a neighbouring state. However, on this occasion Syria offered little protest against the attack, Israel provided no legal justification for its action and most other states remained silent.

This contrast between the international community's reactions to the two incidents raises important questions about the extent to which states' attitudes to the use of pre-emptive military force have changed over the past three decades. Have recent developments including the promulgation of the Bush doctrine and the so-called 'war on terror' led to greater tolerance of the use of pre-emptive force? Should the absence of international comment or criticism of Operation Orchard be interpreted as tacit endorsement of Israel's pre-emptive action? Does the Al-Kibar incident point to an expansion of the customary international law right of self-defence so as to permit the use of force against non-imminent threats? These questions have particular significance given the ongoing impasse over Iran's nuclear program. Yet, perhaps due to a lack of clarity surrounding the factual circumstances of Israel's airstrike, this important incident has largely been overlooked by international law scholars to date.[6]

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[4] This article uses the term 'anticipatory self-defence' to refer to the use of military force to avert a concrete threat of imminent attack, in the sense traditionally understood by the *Caroline* incident. That incident is generally recognised as the basis for the customary international law principle that force could be used in anticipation of an attack if there is a 'necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation'. See *The Caroline Case* (1837) 29 British and Foreign State Papers 1137-38 and Robert Jennings, 'The Caroline and McLeod Cases', (1938) 32 AJIL 82. In this article I use the terms 'pre-emptive self-defence', 'pre-emptive action' and 'pre-emptive strike' to denote the use of force in relation to more remote, non-imminent threats.

[5] SC Res 487 (1981). See also GA Res 36/27 (13 November 1981), in which the General Assembly stated that it '[s]trongly condemns Israel for its premeditated and unprecedented act of aggression in violation of the Charter of the United Nations, and the norms of international conduct, which constitute a new and dangerous escalation in the threat to international peace and security'.

[6] An exception among international legal scholars is Christine Gray, 'The Use of Force to Prevent the Proliferation of Nuclear Weapons' (2009) 52 Japanese YBIL 101 (focussing primarily on the implications of the

This article analyses the legality of Israel's use of force at Al-Kibar and considers its implications for the *jus ad bellum*. Because the facts of the incident are not widely known Part II provides further details of the Israeli airstrike and the international reaction to it. Part III briefly revisits questions over the legal status of anticipatory self-defence and pre-emptive self-defence. It finds that at the time of the Al-Kibar incident international law recognised a right of anticipatory self-defence against imminent threats but did not permit the use of unilateral pre-emptive force to avert non-imminent threats. Using this standard, Part IV assesses the legality of Operation Orchard, concluding that the absence of a threat of imminent attack by Syria means the Israeli airstrike did not constitute a lawful exercise of the right of self-defence. Part V then analyses possible reasons for the failure of other states to condemn Israel's breach of international law, and evaluates the impact of the Al-Kibar incident on the *jus ad bellum*. It argues that due to Israel's failure to offer any legal justification for its action, and the absence of international endorsement of the *legal* basis of the airstrike, the Al-Kibar episode lacks the necessary *opinio juris* to constitute a precedent for the use of pre-emptive force against non-imminent threats. However, the international community's apparent indifference towards the legality of Al-Kibar and other recent incidents suggests a growing tolerance of minor uses of force. This development has the potential to first, undermine the legitimacy of the prohibition on the use of force and second, influence states' decision-making with regard to military action.

II. THE AL-KIBAR INCIDENT AND THE INTERNATIONAL REACTION

A. Initial reports and reaction

The first reports of the Al-Kibar incident appeared in the Syrian media on the afternoon of 6 September 2007, approximately fourteen hours after the Israeli operation.[7]

Al-Kibar incident for the Iranian nuclear issue). For an arms control perspective on the Al-Kibar incident see Leonard Spector and Avner Cohen, 'Israel's Airstrike on Syria's Reactor: Implications for the Nonproliferation Regime' (2008) 36 Arms Control Today 15. For an opinion piece (from an international relations perspective) on Al-Kibar see Joshua Muravchik, 'Preemption, Israeli Style' *Los Angeles Times* (Los Angeles, October 14 2007) 15.

[7] See Richard Weitz, 'Israeli Airstrike in Syria: International Reactions" *Center for Nonproliferation Studies Feature Story* (1 November 2007) for a detailed account of international reporting of the incident. See also Erich Follath and Holger Stark 'The Story of "Operation Orchard": How Israel Destroyed Syria's Al-Kibar Nuclear

According to Syria, Israeli planes had violated Syrian airspace at one o'clock in the morning and dropped munitions in the desert, without causing any damage.[8] Israel refused to comment on the allegations, with its military censor banning local media from reporting on the incident beyond what was available in foreign media sources.[9] The US, too, declined to respond to questions about Syria's claims.[10] The only other states to comment on initial reports of an Israeli violation of Syrian airspace were Iran, Russia, and North Korea.[11] The Secretary General of the Arab League described the Israeli incursion as 'unacceptable manuevers [sic]'.[12] Surprisingly, no individual Arab states commented.[13]

On 9 September 2007 Syria formally complained about the Israeli action, sending identical letters to the UN Security Council and General Assembly.[14] These letters repeated the claim that Israel had 'committed a breach of the airspace of the Syrian Arab Republic' and that 'they dropped some munitions but without managing to cause any human casualties or material damage'.[15] Syria described the incident as a 'flagrant violation by Israel of its airspace' and as part of a pattern of 'Israeli actions in breach of international law'.[16] However, Syria did not request a Security Council meeting to address the issue, nor was it discussed in the General Assembly.[17]

Reactor' (*Spiegel Online*, 2 November 2009) <http:www.spiegel.de/international/world/0,1518,658663,00.html> accessed 17 November 2010.

[8] Yoav Stern, 'US refuses to comment on Syria's claim of Israeli airstrike' (*Haaretz*, 7 September 2007) <http://www.haaretz.com/hasen/spages/901684.html> accessed 17 November 2010.

[9] Tim Butcher, 'Israelis impose blackout over Syria airstrike' *Daily Telegraph* (London, 20 September 2007) 7. See also Stern (n 8).

[10] See Weitz (n 7).

[11] Iran accused Israel of 'spreading insecurity in the region'. Russia expressed 'extreme concern' over the matter. See Weitz (n 7). North Korea said it 'strongly denounces the abovesaid [sic] intrusion'. 'N. Korea condemns Israel for invading Syrian airspace' (*Haaretz*, 12 September 2007) <http://www.haaretz.com/hasen/spages/903537.html> accessed 19 November 2010.

[12] 'AL chief says Israeli violation of Syrian airspace "unacceptable"' (*People's Daily Online*, 8 September 2007) http://english.people.com.cn/90001/90777/6257854.html> accessed 19 November 2010.

[13] Sami Moubayed, 'With friends like these...' (*Al-Ahram Weekly*, 20-26 September 2007) <http://weekly.ahram.org.eg/2007/863/re63.htm> 19 November 2010. The author refers to Syria's disappointment at the 'synchronised silence of the Arab world' following the Israeli strike.

[14] UN Docs S/2007/537; A/61/1041.

[15] ibid.

[16] ibid.

[17] Spector and Cohen (n 6) 17.

After several weeks of speculation about the nature of the Israeli airstrike Syria finally conceded that a target had been hit.[18] According to Syrian President Bashar Al-Assad Israel had attacked a military building that was under construction.[19] The same day, in a General Assembly session, Syria made only brief reference to the incident, warning that 'the failure of the international community, including the Security Council, to condemn that act of aggression will encourage Israel to persist in that hostile pursuit, and will lead to the exacerbation of tensions in the region'.[20] A day later Israel finally broke its silence, confirming that it had struck a target inside Syria but refusing to elaborate on the nature of the target or other aspects of its military operation.[21]

In mid-October 2007 reports appeared suggesting that the site targeted by Israel had been a secret Syrian nuclear complex. Citing unidentified US and foreign intelligence officials, the New York Times said that the facility appeared to have been modelled on a North Korean nuclear reactor, although the extent of North Korean involvement in the project remained unclear.[22] Israel and the US did not comment formally on these reports. The IAEA, however, released a statement that it had no knowledge of any undeclared nuclear activities in Syria.[23]

B. The April 2008 US intelligence briefing on Al-Kibar

[18] It was reported that Israel's target may have been a shipment of nuclear materials from North Korea. Uzi Mahnaimi, Sarah Baxter and Michael Sheridan, 'Israelis "blew apart Syrian nuclear cache"' *Sunday Times* (London, 16 September 2007) 15. There were also suggestions that Israel's action was a warning to Iran over its nuclear programme or an attempt to re-establish Israel's military power in the region after its failure to defeat Hezbollah in the 2006 Lebanon war.

[19] 'Assad sets conference conditions' (*BBC News*, 1 October 2007) <http://news.bbc.co.uk/2/hi/middle_east/7021986.stm> accessed 24 November 2010.

[20] UN Doc A/62/PV.12.

[21] 'Israel admits air strike on Syria' (*BBC News*, 2 October 2007) <http://news.bbc.co.uk/2/hi/middle_east/7024287.stm> accessed 24 November 2010.

[22] David E Sanger and Mark Mazzetti, 'Israel struck Syrian nuclear project, analysts say' *New York Times* (New York, 14 October 2007) 6.

[23] International Atomic Energy Agency, 'Statement attributable to IAEA spokesperson Melissa Fleming on recent media reports concerning Syria' (15 October 2007) <http://www.iaea.org/NewsCenter/PressReleases/2007/prn200718.html> accessed 24 November 2010.

There was little additional information about Operation Orchard until 24 April 2008 when the US released intelligence about the Al-Kibar complex.[24] According to this material US officials had been receiving information about possible nuclear activities in Syria since the late 1990s and by spring 2007 they had obtained evidence which led them to conclude that the Al-Kibar site was a nearly completed nuclear reactor intended to produce plutonium for a weapons program.[25] At the time of the Israeli attack the complex was 'weeks and possibly months' from operational capacity.[26]

The US briefing also provided details of the Israeli air strike on Al-Kibar. It confirmed that '[t]he reactor was destroyed in an Israeli air strike early in the morning of 6 September 2007 as it was nearing completion but before it had been operated and before it was charged with uranium fuel.'[27] According to the US, Israel had taken military action because it 'considered a Syrian nuclear capability to be an existential threat to the state of Israel.'[28] In an apparent reference to the Bush doctrine of pre-emptive force, the US noted that 'we have stated before that we cannot allow the world's most dangerous regimes to acquire the world's most dangerous weapons.'[29] US officials also expressed tentative support for Israel's airstrike, saying '[w]e believe this clandestine reactor was a threat to regional peace and security', and '[w]e understand the Israeli action'.[30]

The release of this information about the Al-Kibar complex by the US prompted responses from the IAEA and Syria. The IAEA issued a statement that it would investigate

[24] Office of the Director of National Intelligence, 'Background Briefing with Senior U.S. Officials on Syria's Covert Nuclear Reactor and North Korea's Involvement' (24 April 2008) http://dni.gov/interviews/20080424_interview.pdf> accessed 24 November 2010. The intelligence briefing explained that the decision to wait several months before disclosing information about the incident was based on concerns that early release of details would have placed significant pressure on Syria to retaliate, which could have threatened regional stability.

[25] ibid 11. The US also indicated that North Korea had been involved in the construction of the reactor.

[26] See Office of the Director of National Intelligence (n 24) 14.

[27] See Office of the Director of National Intelligence (n 24) 3.

[28] See Office of the Director of National Intelligence (n 24) 8.

[29] See Office of the Director of National Intelligence (n 24) 8.

[30] ibid.

the US claims.[31] It criticised the US and Israel over 'the fact that this information was not provided to the Agency in a timely manner' and said it viewed the 'unilateral use of force by Israel as undermining the due process of verification that is at the heart of the non-proliferation regime.'[32] Syria denied that the Al-Kibar site was nuclear-related and claimed that the US lacked credibility after its intelligence failures over Iraq's alleged weapons of mass destruction.[33] Aside from Syria, however, no other states condemned the Israeli airstrike, despite the fact that the US intelligence briefing had provided official confirmation of details of the incident. This unusual silence continued in a Security Council meeting the following day, which discussed non-proliferation issues but made no mention of Israel's use of force.[34]

C. The IAEA investigation into the Al-Kibar site

After receiving information about the Al-Kibar complex from the US the IAEA began an investigation into claims that the site was a covert nuclear reactor. Following visits to Al-Kibar and three other Syrian locations between 22 and 24 June 2008, the IAEA reported that environmental samples taken from the areas 'revealed a significant number of anthropogenic natural uranium particles (i.e. produced as a result of chemical processing) which indicated that the uranium was of a type not included in Syria's declared inventory of nuclear material.'[35] In addition, the IAEA identified several similarities between the features

[31] International Atomic Energy Agency, 'Statement by IAEA Director General Mohamed ElBaradei' Press Release 2008/06 (25 April 2008) <http://www.iaea.org/NewsCenter/PressReleases/2008/prn200806.html> accessed 25 November 2010.

[32] ibid.

[33] Ewen MacAskill and David Batty, 'UN censures US and Israel over Syria nuclear row' (*Guardian Online*, 25 April 2008) <http://www.guardian.co.uk/world/2008/apr/25/syria.usa> accessed 24 November 2010.

[34] 'Security Council Extends "1540 Committee" for Three Years to Halt Proliferation of Mass Destruction Weapons, Encourages States to Map Out Implementation Plans', UN Press Release SC/9310, (25 April 2008).

[35] IAEA, *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic*, GOV/2009/36, para 2. IAEA inspections of another Syrian site, the Miniature Neutron Source Reactor (MNSR) in Damascus, also revealed uranium particles not part of Syria's declared inventory, raising the possibility of a link between these particles and those found at the Al-Kibar site.

of the Al-Kibar complex and those of other nuclear reactor facilities, which suggested the possibility of undeclared nuclear activities at the site.[36]

Since the IAEA's inspection in June 2008 Syria has continued to deny that the Al-Kibar site was nuclear-related. In November 2008 Syria asserted that the uranium particles discovered by the IAEA had come from Israeli missiles used in the airstrike. [37] However, this claim was rejected by the IAEA on the basis that the particles discovered at the site were of a different composition to those found in uranium based munitions.[38] Subsequent IAEA requests to Syria for further information and access to the Al-Kibar site were denied.[39] In a February 2010 report the IAEA criticised Syria's lack of cooperation and stated, in its strongest language yet, that the 'presence of [uranium] particles points to the possibility of nuclear-related activities at the site and adds to questions concerning the nature of the destroyed building.'[40]

In late April 2011 media reports quoted IAEA Director General Yukiya Amano as explicitly confirming that '[t]he facility that was... destroyed by Israel was a nuclear reactor

[36] IAEA, *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic*, GOV/2010/11, para 2. ('The features of the building and the connectivity of the [Al-Kibar] site to adequate pumping capacity of cooling water are similar to what may be found at nuclear reactor sites. The procurement by Syria of large quantities of graphite and barium sulphate, all of which Syria has stated were acquired for civilian and non-nuclear related uses, could support the construction of a reactor.').

[37] IAEA, *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic*, GOV/2008/60, para 8. ('The only explanation for the presence of these modified uranium particles is that they were contained in the missiles that were dropped from the Israeli planes onto the building to increase the destructive power.').

[38] IAEA, *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic*, GOV/2009/9, para 7. ('There is a low probability that the uranium was introduced by the use of missiles as the isotopic and chemical composition and the morphology of the particles are inconsistent with what would be expected from the use of uranium based munitions.').

[39] IAEA, *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic*, GOV/2009/36, para 18.

[40] IAEA, *Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic*, GOV/2010/11, para 4. At a meeting of the IAEA's board of governors on 4 March 2010 Syria's chief IAEA delegate suggested that Israel had dropped the particles from the air during or after the attack, in order to implicate Syria. This theory was dismissed by Western diplomats as 'desperate' and 'weak': see '"Nuclear material dropped by Israeli jets"' (*Arab News*, 5 March 2010) <http://arabnews.com/middleeast/article26084.ece> accessed 25 November 2010.

under construction'.[41] However, the IAEA promptly issued a clarification, stating that the agency had not yet 'reached the conclusion that the site was definitely a nuclear reactor'.[42] Subsequent media reports have suggested that in June 2011 the IAEA will release its formal assessment that the site was a partially built nuclear reactor, which would lay the basis for possible IAEA referral of the matter to the Security Council.[43]

Due to Syria's failure to cooperate with the IAEA, and the destruction of much of the evidence at the site, it may be difficult to ever prove definitively that Al-Kibar was a nuclear complex. However, the IAEA's findings lend strong independent support to claims that Al-Kibar was a covert nuclear reactor under construction. It is clear, though, that at the time of the Israeli airstrike on 6 September 2007 this facility was not yet operational and there was no evidence to suggest that Syria possessed nuclear weapons capabilities.

III. THE LEGALITY OF ANTICIPATORY SELF-DEFENCE AND PRE-EMPTIVE SELF-DEFENCE

The legality of anticipatory self-defence against the threat of imminent attack has been a matter of controversy since the inception of the UN Charter. While the right of self-defence in response to an 'armed attack' is recognised in Article 51 as an exception to the general prohibition on the use of force contained in Article 2(4), there has been ongoing disagreement among states and scholars as to whether force is permitted in the absence of an actual armed attack.[44] This debate has been reignited in recent years by the so-called

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[41] The Associated Press, 'IAEA Chief: Syria tried to build nuclear reactor' (*New York Times*, 28 April 2011) <http://www.nytimes.com/2011/04/29/world/middleeast/29briefs-Syria.html?partner=rss&emc=rss> accessed 3 May 2011.

[42] IAEA, 'IAEA Clarification on Syria', (Press Release, 28 April 2011) <http://www.iaea.org/newscenter/pressreleases/2011/prn201104.html> accessed 2 May 2011.

[43] George Jahn, 'AP Exclusive: Syria's Referral to UN Likely', (*ABC News*, 29 April 2011) <http://abcnews.go.com/International/wireStory?id=13478127> accessed 2 May 2011.

[44] The key part of Article 51 provides that: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against any Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.' Authors who recognise anticipatory self-defence include Derek Bowett, *Self-Defence in International Law* (Praeger 1958) 187-92; Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law* (9th ed, Pearson 1992); Thomas Franck, *Recourse to Force* (CUP 2002) 103. Those who question its existence include Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963) 257-76; Louis Henkin, *How Nations Behave*

Bush doctrine of pre-emptive action, which attempted to expand the already controversial notion of anticipatory self-defence to include the use of force against non-imminent threats.[45]

These issues have been the subject of detailed academic consideration in recent years so they are only briefly considered here.[46] The first section examines the status of anticipatory self-defence under international law as it stood before the Bush doctrine. The second then assesses whether state practice since the promulgation of that doctrine has led to a modification of customary international law governing the circumstances in which anticipatory force may be used. In particular, it considers whether a right to use pre-emptive force in relation to non-imminent threats had come into existence by the time of the Israeli air strike on Al-Kibar in 2007.

Before examining the status of anticipatory self-defence and the impact of the Bush doctrine on the *jus ad bellum* it is necessary to briefly outline the methodology that this article applies in determining whether there has been a modification of customary international law.[47] When a new practice or proposed change to the content or interpretation of existing law is advanced by a state, the reactions of other states and

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(Columbia University Press 1979) 141-44; Christine Gray, *International Law and the Use of Force* (3rd ed, OUP 2008) 160-66.

[45] See *The National Security Strategy of the United States of America* 41 ILM 1478 (2002).

[46] See, for example, Andrew Garwood-Gowers, 'Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy?' (2004) 23 Australian Year Book of International Law 51; Christian Henderson, 'The Bush Doctrine: From Theory to Practice', (2004) 9 JCSL 3; Christopher Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 San Diego International Law Journal 7; Abraham D Sofaer, 'On the Necessity of Pre-emption', (2003) 14 EJIL 209; W Michael Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense' (2006) 100 AJIL 525; David Sadoff, 'A Question of Determinacy: The Legal Status of Anticipatory Self-Defense' (2009) 40 Georgetown Journal of International Law 523; Christian Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States Upon the* Jus ad Bellum *in the Post-Cold War Era* (Ashgate 2010).

[47] A detailed examination of methodology surrounding customary international law formation and modification is beyond the scope of this article. For discussion of those issues generally, see Michael Akehurst, 'Custom as a Source of Law', (1974-75) 47 BYBIL 1; Malcolm Shaw, *International Law* (6th ed, CUP: 2008) 72-93; Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757. On different approaches to customary international law in the context of the *jus ad bellum*, see Olivier Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate', (2005) 16 EJIL 803; Henderson, *The Persistent Advocate* (n 46) 7-33.

relevant actors to that action or claim must be scrutinised.[48] While states are the formal actors involved in the development of customary international law and are therefore the primary focus of analysis, this article also considers statements from secondary actors such as the International Court of Justice (ICJ) and scholars of international law as a subsidiary means of interpreting state practice and the status of the law.[49] If the international community's response – in the form of actions or words - indicates *general* acceptance of a new practice or interpretation then it can be said that a change to customary international law has taken place.[50] It should be noted that this 'general' acceptance must relate to the *legality* of the new practice in order to constitute the *opinio juris* needed to effect a change in the law.[51] In the context of the *jus ad bellum* it has been suggested that if the prohibition on the use of force is a *jus cogens* norm a higher threshold of agreement by *all* states is required before any alteration to the content or scope of the prohibition can occur.[52] However, given that the prohibition on the use of force is not universally recognised as having peremptory status, this article applies the regular standard of 'general' acceptance in determining whether there has been a modification of customary international law on the use of force.[53] A final point in relation to methodology concerns the impact of negative reactions by other states and actors. If there is *significant* opposition to a new practice or proposed modification to the law, then it cannot be said that the international community has displayed 'general' acceptance of that change. In such circumstances, customary international law remains unaltered.

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[48] On the International Court of Justice's approach to customary international law see for example, *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) [1969] ICJ Reports 5, paras 73-77; *Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] ICJ Reports 14, paras 183-207.

[49] For further discussion of this approach and the theory of 'interpretive communities', see Henderson, *The Persistent Advocate* (n 46) 22-33.

[50] This follows the approach of the ICJ which requires 'that the conduct of States should, in general, be consistent with such rules'. See *Nicaragua Case* (n 48) para 186.

[51] *Nicaragua Case* (n 48) paras 183-89.

[52] Henderson, *The Persistent Advocate* (n 46) 27-29. A *jus cogens* or peremptory norm is 'a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified by a subsequent norm of general international law having the same character': *Vienna Convention on the Law of Treaties* (1969) Article 53.

[53] A similar approach is taken by Henderson, *The Persistent Advocate* (n 46) 27-29.

A. Anticipatory Self-Defence before the Bush Doctrine

In the nineteenth century the use of anticipatory force was a regular occurrence in the international system and was permissible under customary international law. Despite criticism from some scholars over its interpretation, the famous *Caroline* incident of 1837 is generally recognised as providing the classic criteria by which the legality of anticipatory self-defence should be judged.[54] That incident established that it was not necessary to wait until an actual attack had occurred before the right of self-defence could be exercised; rather, force could be used if the necessity to act was 'instant, overwhelming, leaving no choice of means, and no moment of deliberation'.[55] This statement formed the basis of the customary international law principle that a state could use necessary and proportionate force when threatened with an imminent attack.

With the inception of the UN Charter in 1945 the status of anticipatory self-defence became less clear. The ambiguous wording of Article 51 has provided a basis for scholars and states to argue both for and against the existence of a right of anticipatory self-defence.[56] On the one hand, Article 51 makes express reference to the right of self-defence 'if an armed attack occurs'. This appears to rule out any right of anticipatory self-defence, because by definition such action is not a response to a prior armed attack. On the other hand, however, Article 51 refers to the 'inherent right of self-defence', thereby suggesting that the earlier customary international law right of self-defence – presumably including anticipatory action – remains intact. This ambiguity has produced a doctrinal division, which has continued to the present day.

Any customary international law right of anticipatory self-defence that survived the inception of the Charter will necessarily have been influenced by state practice since 1945.[57] However, there is disagreement among both states and scholars over the interpretation of

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[54] See sources at n 4 for more on the *Caroline* incident. One critic of the continuing reliance on the *Caroline* incident is Timothy Kearley, 'Raising the Caroline' (1999) 17 Wisconsin International Law Journal 325.

[55] These are the famous words of United States Secretary of State Daniel Webster made in diplomatic correspondence between the United States and UK following the *Caroline* incident. 29 British and Foreign State Papers 1137-38.

[56] For more on the textual debate, see n 44.

[57] *Nicaragua Case* (n 48) para 176.

various incidents and their relevance to the issue of anticipatory self-defence. Some authors such as Greenwood,[58] Franck,[59] O'Brien[60] and Arend[61] argue that state practice since 1945 confirms the existence of such a right. However, these writers often rely on incidents in which states did not explicitly refer to anticipatory self-defence as the legal basis for their actions.[62] Examples of such situations include Israel's action in beginning the 1967 war with Egypt, Jordan and Syria, as well as Iraq's invasion of Iran in 1980, and the United States' attack on an Iranian airliner in 1988.[63] Although these incidents may appear at first glance to be examples of anticipatory action, the states using force claimed to have suffered an *actual* armed attack that triggered their right to respond in self-defence according to Article 51. States have adopted this approach because it is less controversial than openly relying on the doctrine of anticipatory self-defence.

The most significant incident involving an explicit invocation of anticipatory self-defence as a legal justification was Israel's bombing of Iraq's Osirak nuclear reactor in 1981.[64] Israel's claim that it had acted in response to the threat of nuclear attack from Iraq was not accepted by the international community. Both the Security Council and the United Nations General Assembly condemned the Israeli action, with Security Council resolution 487 (1981) describing it as a 'clear violation of the Charter of the United Nations'.[65] However, the respective resolutions did not explicitly reject the concept of anticipatory self-defence *per se*. While some states, including Egypt and Mexico, clearly indicated their opposition to any notion of anticipatory force, others such as France and Italy condemned the Israeli action because they believed the facts did not establish the existence of a threat of imminent attack by Iraq.[66] The United States was the only state that expressly supported

[58] Greenwood (n 46) 15.

[59] Franck (n 44) 56.

[60] William V O'Brien, *The Conduct of Just and Limited War* (Praeger 1981) 133.

[61] Anthony C Arend, 'International Law and the Preemptive Use of Military Force' (2003) 8 The Washington Quarterly 94.

[62] Gray (n 44) 161.

[63] ibid.

[64] For more on the Osirak incident see sources at n 3.

[65] UN Doc S/1981; UN Doc A/RES/36/27.

[66] See Greenwood (n 46) 14 (suggesting that the responses of France and Italy implied that the two states recognised the concept of anticipatory self-defence but decided that the conditions under which it could be exercised did not exist in the Osirak situation).

the concept of anticipatory self-defence. However, it rejected the Israeli claim on the grounds that peaceful means of resolving the dispute had not been exhausted.[67]

To date the International Court of Justice (ICJ) has not ruled on the legality of anticipatory self-defence. In the *Nicaragua Case* the Court expressly declined to discuss 'the issue of the lawfulness of a response to the imminent threat of armed attack', on the basis that this question did not arise on the facts of the case.[68] The ICJ also avoided the issue in the *Nuclear Weapons Case*.[69]

The limited - and often ambiguous - state practice involving anticipatory force, plus the ICJ's reluctance to address the issue, meant that prior to the 2002 Bush doctrine there was considerable uncertainty surrounding the legal status of anticipatory self-defence. While there was support for such a right from some states and scholars, others were clearly opposed to the notion of using force in the absence of an actual armed attack. In practice, states were reluctant to explicitly rely on anticipatory self-defence as a legal justification for their actions, preferring instead to claim that they were responding to an actual armed attack in accordance with Article 51. Thus, prior to the emergence of the Bush doctrine, the right to use force in anticipatory self-defence against the threat of imminent attack remained highly controversial.

B. Anticipatory Self-Defence and Pre-Emptive Self-Defence since the Bush Doctrine

Despite ongoing controversy over the status of anticipatory self-defence, in 2002 the Bush administration made an explicit claim to a broader right of pre-emptive self-defence against new threats posed by so-called 'rogue states' and non-state terrorist actors seeking to develop or obtain weapons of mass destruction.[70] The *2002 National Security Strategy* of *the United States of America* (NSS) stated that '[we] can no longer rely solely on a reactive posture as we have in the past', and 'to forestall or prevent such hostile acts by our

[67] UN Doc S/PV. 2288 (19 June 1981) 16.
[68] *Nicaragua Case* (n 48) para 194.
[69] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226.
[70] For discussion of the Bush doctrine of pre-emptive self-defence see sources at n 46.

adversaries, [we] will, if necessary, act pre-emptively'.[71] The United States' willingness to take 'anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack', indicated that it was claiming a wide right to act pre-emptively against more remote, less imminent threats than those envisioned by the traditional concept of anticipatory self-defence.[72] This doctrine of pre-emptive self-defence would allow the United States to use force to prevent its enemies from developing or obtaining weapons of mass destruction that *might* later be used against it. The NSS acknowledged that this concept did not sit comfortably with existing notions of self-defence under international law, stating that '[w]e must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries'.[73] This was an attempt to breathe new life into the *Caroline* formula by proposing a more flexible interpretation of the imminence requirement.

The Bush doctrine of pre-emptive self-defence proved to be extremely controversial. A detailed survey of all states' responses to the United States' assertion is beyond the scope of this article.[74] However, a brief examination of major developments since 2002 is sufficient to indicate that the international community has not shown a willingness to embrace the broad right of pre-emptive self-defence claimed by the United States. While the notion of pre-emptive force against non-imminent threats has not been accepted, a by-product of the Bush doctrine appears to be greater explicit support for the more limited

[71] *The National Security Strategy of the United States of America* (n 45).

[72] ibid.

[73] ibid 15. There is scholarly disagreement over the validity of the United States' assertion that the existing law requires reappraisal in order to respond to contemporary threats. See for example, the debate in this journal: Amos Guiora, 'Anticipatory Self-Defence and International Law – A Re-Evaluation', (2008) 13 JCSL 3 (proposing the introduction of pre-emptive self-defence within a process-based 'strict scrutiny' framework involving the executive submitting intelligence information to a court of law); Tarcisio Gazzini, 'A Response to Amos Guiora: Pre-Emptive Self-Defence Against Non-State Actors', (2008) 13 JSCL 25 (arguing against the introduction of pre-emptive self-defence on the basis that the current legal framework is flexible enough to respond to international terrorism); Muge Kinacioglu, 'A Response to Amos Guiora: Reassessing the Parameters of Use of Force in the Age of Terrorism', (2008) 13 JSCL 33 (questioning the feasibility of Guiora's 'strict scrutiny' approach).

[74] For an in-depth examination of other states' responses to the Bush doctrine see Reisman and Armstrong (n 46) 538-48.

right of anticipatory self-defence in relation to imminent threats, although this too remains somewhat controversial.

The first major test of the Bush doctrine came with the 2003 Iraq war. While the primary legal justification ultimately offered by the United States, UK and Australia was Security Council authorisation for the use of force, many viewed the conflict as an example of pre-emptive force.[75] As such, widespread opposition to the Iraq war indicates that the international community's initial reactions to the Bush doctrine were less than enthusiastic. Both before and after the start of the Iraq war, some governments, including those of Germany and Spain, plus the Islamic Conference of Foreign Ministers, explicitly rejected the concept of pre-emptive self-defence outlined by the United States.[76]

On the other hand, some states, including the United Kingdom[77], Australia[78], Japan[79] and Russia[80] have made statements that might appear at first glance to support the Bush doctrine. However, on closer examination these claims are actually more limited in their scope than the United States' assertion.[81] This is evident in two respects. Firstly, many of these claims, including those of the United Kingdom and Australia, are more properly characterised as supporting anticipatory self-defence in response to the threat of *imminent* attack, as opposed to the broader notion of pre-emptive self-defence against non-imminent

[75] See William H Taft and Todd F Buchwald, 'Preemption, Iraq, and International Law' (2003) 97 AJIL 557, where two of the United States' legal advisors argue that the Iraq war was a lawful exercise of pre-emptive self-defence. In its letters to the Security Council reporting the use of force the United States made only brief and somewhat vague reference to self-defence. See UN Doc S/2003/352 (21 March 2003): 'The actions that coalition forces are undertaking are an appropriate response. They are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area.' There was no reference to self-defence in either the United Kingdom's or Australia's legal positions; see UN Docs S/2003/350 and S/2003/352 (20 March 2003) respectively.

[76] Reisman and Armstrong (n 46) 547.

[77] ibid 541-44, referring to a variety of statements by UK ministers, some of which suggest support for the Bush Doctrine while others point to the narrower right of anticipatory self-defence.

[78] On the Australian position see generally Nicole Abadee and Donald R Rothwell, 'The Howard Doctrine: Australia and Anticipatory Self-Defence against Terrorist Attacks' (2007) 26 Australian Year Book of International Law 19.

[79] On Japanese statements regarding pre-emptive or anticipatory action see Christine Gray, 'The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA' (2006) 5 Chinese Journal of International Law 555, 567-68.

[80] On Russian statements see Gray (n 79) 568.

[81] Reisman and Armstrong (n 46) 547.

threats.[82] Secondly, as Reisman and Armstrong note, virtually all of the remaining claims relate to military action against *non-state* actors who have a record of committing previous attacks in the context of ongoing or serial conflicts.[83] In this regard, such statements do not represent support for the United States' claim of a right to use pre-emptive force against other *states*, nor do they advocate action to initiate conflict against perceived but as yet unverified threats.

The views of states can also be discerned from the positions taken in reports published by major international organisations since the promulgation of the Bush doctrine. These documents reveal an unwillingness to support the concept of pre-emptive self-defence. For example, the EU's first *European Security Strategy* published in December 2003, discussed new threats in the international system but made no mention of adopting a right of pre-emptive action.[84] At the UN level, both the 2004 High Level Panel Report[85] and the 2005 Report of the Secretary General (*In Larger Freedom*)[86] rejected the notion that states have the right to act unilaterally against non-imminent threats, saying instead that in such circumstances it is the responsibility of the Security Council to authorise the use of pre-emptive force. The two UN documents did, however, state that anticipatory self-defence in relation to the threat of imminent attack was legal. The High Level Panel asserted that anticipatory self-defence was part of 'long-established international law',[87] while *In Larger Freedom* stated that 'imminent threats are fully covered by Article 51'.[88] Both reports

[82] On the United Kingdom's position, Lord Goldsmith has stated that '[i]t was never the position of the government that the military action against Iraq was legally justified on grounds of "pre-emptive self defence"', *Lords Hansard*, 21 April 2004, column 371. See also Christine Gray, 'A Crisis of Legitimacy for the UN Collective Security System?' (2007) 56 ICLQ 157, 162-163 (concluding that the United Kingdom's position indicates acceptance of anticipatory self-defence). On the Australian position, see Abadee and Rothwell (n 78) 59 (finding that the Australian position is closer to the classic notion of anticipatory self-defence than to the Bush doctrine of pre-emptive self-defence).

[83] Reisman and Armstrong (n 46) 548.

[84] *European Security Strategy: A Secure Europe in a Better World* <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf> accessed 2 May 2011.

[85] *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc A/59/565, para 190.

[86] *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, UN Doc A/59/2005, para 125.

[87] High Level Panel Report (n 85) para 188.

[88] *In Larger Freedom* (n 86) para 124.

appeared to treat anticipatory self-defence as an uncontroversial, settled area of international law, which was highly inaccurate given the longstanding doctrinal divisions over the concept.[89] The ongoing nature of these disagreements was evident in the responses of some states, including members of the Non-Aligned Movement, who criticised the broad interpretation of self-defence taken by the High Level Panel and the Secretary General in their respective reports.[90] As a result of those divisions over the *jus ad bellum*, a third UN report, the September 2005 World Summit *Outcome Document*, made no reference to anticipatory self-defence.[91] Viewed together, the various reports at UN and EU-level clearly indicate an absence of support for the Bush doctrine of pre-emptive self-defence.

Despite the international community's failure to endorse the Bush administration's 2002 notion of pre-emptive force, the United States reaffirmed its support for the doctrine in its *2006 National Security Strategy of the USA*.[92] However, unlike the 2002 NSS – which had expressly acknowledged the *jus ad bellum* and called for a reinterpretation of the concept of 'imminence' – the discussion of pre-emptive action in the 2006 NSS contained no reference to international law. This change of emphasis may have been a reflection of the Bush administration's general disdain for international law.[93] Alternatively, it might be viewed as implicit recognition by the United States' that its earlier, proposed modification of the imminence requirement had not been accepted by the international community, and that it would be fruitless to continue to advocate such a change.[94] Regardless of the reason for the shift in language, the 2006 reaffirmation of the Bush doctrine appears to have had

[89] Gray describes both reports as 'controversial' in this regard. See Gray (n 82) 160. Reisman and Armstrong suggest that the High Level Panel Report engaged in 'subliminal emendation of the Charter'. See Reisman and Armstrong (n 46) 533.

[90] See *Comments of the Non-Aligned Movement on the Observations and Recommendations Contained in the Report of the High-Level Panel On Threats, Challenges and Change*, UN Doc A/59/565, 28 Feb 2005, paras 22-24.

[91] *2005 World Summit Outcome*, UN Doc A/60/L.1.

[92] *The National Security Strategy of the United States of America* (16 March 2006) <http://www.globalsecurity.org/military/library/ policy/national/nss-060316.htm4> accessed 2 May 2011.

[93] Gray (n 79) 563.

[94] Henderson (n 46) 191.

little impact on the views of other states: the vast majority continue to oppose the concept of pre-emptive self-defence.[95]

As discussed earlier, the ICJ has not yet *directly* addressed the legality of anticipatory or pre-emptive self-defence. However, there have been indications from the Court since the promulgation of the Bush doctrine that it continues to favour a restrictive view of self-defence that would not include the use of pre-emptive force. In *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*[96] the ICJ appeared to disapprove of Uganda's attempts to rely on Article 51 as justification for what the Court termed 'preventative'[97] action intended to 'protect perceived security interests'.[98] The United States' claim to a right of pre-emptive force to prevent the development of weapons of mass destruction capabilities fits squarely within this category of 'preventative' action referred to by the ICJ. As such, it is unlikely that the Court would regard the type of pre-emptive action envisaged by the Bush doctrine as part of the right of self-defence.

Overall, developments since the emergence of the Bush doctrine indicate that the international community has not accepted the broad right of pre-emptive self-defence claimed by the US. Hence, there has been no modification of customary international law in this regard. It is, therefore, clear that at the time of the Israeli airstrike on Al-Kibar international law did not permit the use of force to avert non-imminent threats. However, since 9/11 and the 2002 NSS there has been a discernible shift towards greater explicit support among states and the United Nations itself for the narrower right of anticipatory self-defence. While some developing states remain opposed to such a concept, on balance state practice since 9/11 indicates that customary international law now recognises a right of anticipatory self-defence that permits necessary and proportionate force to avert the

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[95] For example, following the 2006 NSS the Non-Aligned Movement repeated its opposition to the doctrine of pre-emptive self-defence, saying it '[o]pposed[d] and condemn[ed] ... the doctrine of pre-emptive attack'. See *Final Document of the 14th Summit of the Non-Aligned Movement*, <http://www.namegypt.org/en/relevantdocuments/pages/default.aspx> accessed 2 May 2011.

[96] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* (2005) ICJ Reports 116. For analysis of the *Armed Activities* judgment see Phoebe N Okowa, 'Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of Congo v Uganda) (2006) 55 ICLQ 742.

[97] ibid para 143.

[98] ibid para 148.

threat of imminent attack.[99] It is this standard that is used in Part IV to assess the legality of Israel's Operation Orchard.

IV. THE LEGALITY OF OPERATION ORCHARD

To date, Israel has not offered any legal justification for its airstrike on the Al-Kibar complex.[100] If it were to do so, it is likely that self-defence would be relied upon.[101] In order to qualify as a lawful act of anticipatory self-defence Operation Orchard must have been a necessary and proportionate response to a threat of imminent attack.

Israel's airstrike on Al-Kibar clearly fails to conform to any conventional understanding of the imminence requirement. As discussed in Part II, the alleged nuclear facility at Al-Kibar was not yet operational and there were no indications that Syria possessed nuclear capabilities at the time of the Israeli action or was planning to attack Israel. While Israel may, understandably, have been concerned about the consequences of nuclear proliferation in the region, any possible or potential danger posed by the Al-Kibar complex on 6 September 2007 did not amount to a threat of imminent attack.[102] This lack of imminence means that Israel's right to use force in anticipatory self-defence was not triggered in these circumstances. Instead, the Israeli action appears to have been a clear example of a pre-emptive strike based on the rationale behind the Bush doctrine. International rejection of this doctrine, discussed in Part III, means that the Israeli airstrike on Al-Kibar fell outside the scope of the right of self-defence and therefore, constituted an unlawful use of force.

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[99] For necessity and proportionality generally, see Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004).

[100] See part V of this article for discussion of the significance of this failure to offer any legal justification for the Al-Kibar airstrike.

[101] It is possible that Israel might also try to justify its action as part of an ongoing 'state of war' between Israel and Syria. Israel used a similar argument in relation to Iraq when explaining its attack on Iraq's Osirak nuclear reactor in 1981. See UN Doc S/PV/2280 (1981) 42.

[102] See also Spector and Cohen (n 6) 18, reaching a similar conclusion on the imminence requirement.

Having established that the Israeli airstrike was unlawful due to the absence of a threat of imminent attack by Syria it is not, strictly speaking, necessary to consider the necessity and proportionality of Israel's action. However, as states often frame their support for, or criticism of, military action in terms of necessity and proportionality it is useful to briefly consider these two elements.[103]

For military force to be considered necessary there must have been no other feasible means of dealing with a particular threat.[104] In the context of anticipatory self-defence the necessity element is inextricably linked to the imminence requirement. If a threatened attack is not imminent then it is difficult to maintain that there are no other means of dealing with that threat besides the use of force. A non-imminent threat means that a state has the time and opportunity to explore diplomatic and other non-forceful methods of resolving a dispute before resorting to military action. Therefore a failure to establish the imminence of a threatened attack will necessarily cast serious doubt on a state's claim that it was necessary to use force to remove that threat.

On that basis, it is unlikely that the Israeli airstrike on Al-Kibar satisfied the necessity requirement. As was the case in 1981 in relation to the Osirak incident, Israel did not exhaust peaceful means of resolving its concerns over Syria's nuclear intentions; in fact, it did not even make public its intelligence findings relating to Syria's alleged nuclear activities. This failure to attempt to resolve the matter diplomatically through the IAEA or the Security Council means it is difficult to mount a credible argument that Israel's airstrike was a necessary use of force.[105] It appears that military force was used as a first option, rather than as a last resort, possibly in an attempt to achieve Israel's broader strategic and military deterrence objectives in the region. Whatever the motivations underpinning the airstrike, it

[103] Gray notes that the ICJ tends to regard necessity and proportionality as 'marginal considerations, to be considered after the legality or otherwise of the use of force had already been established on other grounds', whereas states assign a more significant role to the two requirements when discussing the lawfulness of military action. Gray (n 44) 154.

[104] For more on necessity generally, see Gardam (n 99) 148-55.

[105] Cf Spector and Cohen, who suggest that Israel was justified in not bringing the matter to the attention of the IAEA. They argue firstly, that the ongoing Iranian nuclear issue highlights the inadequacy of the IAEA's inspections regime and secondly, that Israeli intelligence sources may have been compromised by sharing information about the Al-Kibar site with the IAEA: see Spector and Cohen (n 6) 19.

is submitted that Israel's recourse to military force against Syria did not satisfy the necessity requirement of self-defence.

Closely linked to the element of necessity is the requirement that force used in anticipatory self-defence be proportionate to the danger posed by the threatened attack.[106] In other words, a forcible response must be limited to removing that threat, and cannot extend beyond this defensive objective to encompass the pursuit of broader offensive or strategic goals.[107] Relevant factors in assessing the proportionality of a particular use of force include its geographical and temporal scope, as well as the choice of means, and the impact on civilians and third states.[108] If these criteria are applied to the Al-Kibar incident it is arguable that the Israeli airstrike was not disproportionate. Firstly, military action was limited to a single aerial operation focussed specifically on the Al-Kibar complex, the sole military target representing the alleged threat to Israel. Secondly, Operation Orchard consisted of precision airstrikes with little or no collateral damage or impact on civilians or third states. On this basis, Israel's action constituted a relatively minor use of force which was aimed solely at removing the source of the alleged threat. Hence, it appears to comply with the proportionality requirement. This conclusion is, however, largely immaterial, given that the illegality of the Israeli airstrike has already been established on other grounds.

Part IV has found that the Israeli airstrike on Al-Kibar cannot be considered a legitimate exercise of the right of anticipatory self-defence for two reasons. First, there is no evidence to suggest that Israel faced a threat of imminent attack that would have triggered its right to use force in self-defence. Second, and closely linked to the first ground, Israel's action cannot be considered a necessary response to what was merely a remote or potential threat posed by Syria. Therefore, the airstrike on Al-Kibar did not fall within the scope of Israel's right of self-defence and must, consequently, be considered an unlawful use of force in violation of Article 2(4) of the Charter.

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[106] Gardam (n 99) 179-80.
[107] ibid.
[108] ibid.

V. THE IMPLICATIONS OF AL-KIBAR

While assessing the legality of Israel's pre-emptive airstrike on Al-Kibar is relatively straightforward, the more challenging tasks lie in identifying the reasons for the international community's failure to condemn the Israeli action, and in analysing the overall impact of this incident on the *jus ad bellum*. As was the case with Israel's 1981 military action against Iraq's Osirak reactor, its pre-emptive strike on Al-Kibar clearly fell outside the scope of the right of self-defence as it was interpreted at that time by all states except the US and Israel itself. Yet unlike Osirak, which drew widespread international condemnation of Israel, the Al-Kibar episode elicited virtually no reaction or criticism from other states.

Two key questions emerge from the international reaction to Al-Kibar. First, why did the international community largely ignore Israel's pre-emptive strike? Second, what impact, if any, has the Al-Kibar incident had on the *jus ad bellum*?

A. Analysing the International Reaction to Al-Kibar

Determining the reasons for other states' failure to protest a breach of international law is often problematic.[109] Silence does not always equate to acquiescence in the legality of that breach; rather it may be due to other, non-legal factors such as lack of knowledge about an incident or political considerations.[110] As such, the international community's failure to condemn Israel's pre-emptive strike on Al-Kibar is open to a number of possible interpretations. These include practical, political and legal explanations for the very limited reaction to Israel's unlawful use of force.

The most straightforward explanation is that the absence of international comment was merely due to a lack of reliable information about the incident.[111] As discussed in Part II, the unusual reluctance of all parties to discuss the issue meant that Operation Orchard was initially shrouded in mystery. Syria offered only limited protest against the Israeli action,

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[109] Roberts (n 47) 778.

[110] ibid. See also Akehurst (n 47) 38-42. On failure to condemn the unlawful use of force, see Gray (n 44) 244, who notes that since the end of the Cold War there is no longer automatic protest by one bloc of states against the use of force by the other bloc.

[111] Spector and Cohen (n 6) 15.

perhaps fearing that a stronger complaint would lead to greater international scrutiny of the nature of the Al-Kibar site, which might reveal the existence of undeclared nuclear activities in breach of Syria's obligations under the NPT.[112] This downplaying of the incident by Syria, coupled with a refusal by Israel and the US to comment on the issue, may have meant that other states were simply not prepared to express their views on Operation Orchard until further information became available. However, while this may account for the initial period of silence following the incident it does not explain why the international community continued to refrain from comment even after details of Israel's airstrike were officially confirmed by the US in April 2008.[113]

Political factors relating to the international community's general dislike for the Syrian regime may offer some explanation for the continued absence, after April 2008, of international criticism of Israel's airstrike.[114] Spector and Cohen suggest that '[a]s an isolated state with close ties to Iran, Syria is perceived as a disruptive influence in the region, even within the Arab community, making it a decidedly less sympathetic victim of Israeli pre-emption than Iraq in 1981'.[115] Syria's unpopularity may well explain, at least in part, the different reactions to Osirak and Al-Kibar. It is interesting to note, however, that as recently as 2003 the international community was highly sympathetic towards Syria – and strongly critical of Israel - following an incident in which Israel targeted an alleged Islamic Jihad training camp inside Syria in response to a suicide bombing in northern Israel.[116] Although Syria's international position may have weakened somewhat between 2003 and

[112] ibid 17.

[113] ibid 18.

[114] See Gray (n 6) 113, querying whether the 'lack of discussion [of the Al-Kibar incident is] explicable because of the weaker political position of Syria' in 2007.

[115] Spector and Cohen (n 6) 18.

[116] UN Doc S/PV.4836. In an emergency Security Council meeting on 5 October 2003 most states condemned Israel's action as a violation of international law. Some states described it as an 'act of aggression' while others classified it as a 'reprisal'. The US, however, stated that Syria was 'on the wrong side in the war on terror'. For more on the 2003 Israel-Syria incident, see Kimberley Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors' (2007) 56 ICLQ 141, 152-53.

2007, it is difficult to determine whether this political change alone was responsible for the lack of international concern over Al-Kibar, or whether other factors were also at play.[117]

The contrast between the international reactions to the 2003 and 2007 Syrian-Israeli incidents may also be attributable to two other factors. First, other states may have distinguished the two Israeli airstrikes on the basis of the nature of the target. Israel's 2003 airstrike on an ordinary, non-nuclear military target was roundly condemned. Yet in 2007 Syria's attempt to establish a secret nuclear capacity at Al-Kibar may have been viewed by the international community, including Arab states, as an undesirable development, hence the lack of criticism of Israel's destruction of the reactor.[118] A second possible reason for the contrasting international responses relates to Syria having reacted differently to the two Israeli attacks. In the earlier case, Syria protested strongly against Israel's action, requesting an emergency meeting of the Security Council which led to extensive discussion of the issue by other states. In contrast, following Al-Kibar Syria's complaints were far more limited, both in terms of the information it provided about the incident, and the intensity with which its diplomatic protests were pursued. This muted reaction by Syria may have meant that by the time details of the Israeli airstrike were officially confirmed by the US several months later the Al-Kibar incident had been overtaken by more pressing concerns and had slipped off the international agenda.[119]

An initial lack of knowledge about the Al-Kibar incident, plus the political factors mentioned above, may go some way towards explaining the international community's failure to condemn Israel's airstrike. Nevertheless, the absence of criticism of Operation Orchard also raises more fundamental questions relating to states' attitudes to pre-emptive force.

In this regard, there are two additional interpretations of the international community's failure to condemn Israel. The first, more radical view is that this silence should be taken as

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[117] Gray (n 6) 113.

[118] Muravchik (n 6) suggests that the nuclear factor was significant in explaining the international community's failure to condemn Israel's attack on Al-Kibar.

[119] This explanation for the ongoing silence was offered by the Egyptian Ambassador to the United States: Spector and Cohen (n 6) 18.

tacit endorsement of, or acquiescence in, the legality of Israel's pre-emptive strike on Al-Kibar – in other words, *opinio juris*.[120] The alternative explanation attributes the lack of condemnation to *political* support for Israel's action, rather than acceptance of the *legal* basis of that use of force.

The first interpretation of the international reaction to Al-Kibar is difficult to sustain. For a start, Israel did not offer any legal justification for its airstrike. Gray notes several possible reasons for this: first, that Israel did not consider pre-emptive self-defence to have any basis in international law; second, that it accepted such a doctrine but did not regard it as applicable to the facts of Al-Kibar; or third, that it chose not to advance such a justification because doing so would have paved the way for other states to make similar claims.[121] Regardless of the reason, this failure to explicitly invoke pre-emptive self-defence as the basis for its use of force significantly weakens claims that other states' silence represents acquiescence in the legality of the Israeli action.[122] Had the international community's muted reaction been a response to express reliance by Israel on a right of pre-emptive self-defence, there would be stronger grounds for advancing such a claim. However, as it stands, the absence of any legal justification by Israel means it is difficult to mount a credible argument that the international community's lack of protest constituted acceptance of the *legal* basis of the Israeli action.

The second interpretation views the absence of criticism as a reflection of the international community's political support for, or understanding of, Israel's action, rather than endorsement of the actual legal basis of that use of force. As mentioned above, other states may have been concerned at Syria's attempts to develop nuclear capabilities, and were, therefore, quietly relieved by Israel's destruction of the Al-Kibar site. This apparent political acceptance of unilateral pre-emptive force could be seen as evidence that the international community has lost confidence in the enforcement mechanisms relating to

[120] This interpretation is raised, and ultimately rejected by Spector and Cohen (n 6) 15. However, it appears to be the view of one US neoconservative political commentator: see Muravchik (n 6) and discussion in part V.
[121] Gray (n 6) 109.
[122] ibid 116.

non-proliferation following consistent violations by Iraq, Iran and North Korea.[123] On this interpretation of Al-Kibar, the failure to condemn Israel was based on a political understanding of the reasons why Israel undertook unilateral action. It does not assert that the absence of criticism indicated acceptance of the legal basis of the Israeli airstrike.

This more cautious explanation for the lack of international concern over Al-Kibar appears to hold greater weight than the view that silence constituted acquiescence in the legality of Israel's pre-emptive strike. That said, it remains difficult to reach definitive conclusions on the precise weight that should be attached to each of the suggested reasons for the international community's failure to condemn the Israeli action. The most plausible interpretation is that the unusual silence following Al-Kibar was the result of a combination of factors, including an initial lack of knowledge about the incident, Syria's weak international position, and broader political concerns over the proliferation of nuclear weapons.

B. Implications for the *Jus Ad Bellum*

Due to the reluctance of Israel and other states to make explicit pronouncements on the legality of the Al-Kibar airstrike the implications of this incident for the law on the use of force are difficult to assess. One conservative political commentator, Muravchik, argues that Al-Kibar points to a revival of the Bush doctrine of pre-emptive self-defence.[124] In his view, '[t]his latest episode suggests that an intense rethinking [towards pre-emptive action] is underway in many capitals.'[125] He concludes that '[law] is gradually changing to accommodate new realms of self-defense.'[126]

This suggestion that Al-Kibar has initiated a process of modification of the *jus ad bellum* is difficult to sustain.[127] The extent to which Al-Kibar can be viewed as a legal precedent for

[123] Spector and Cohen (n 6) 16.
[124] Muravchik (n 6).
[125] ibid.
[126] ibid.
[127] Similarly, Spector and Cohen conclude that '[i]t probably would be an overstatement to interpret the international silence on the al-Kibar attack as constituting tacit endorsement that diplomatic mechanisms for enforcing the non-proliferation regime have proven ineffective and that threatened states have a right to preventively attack clandestine foreign nuclear facilities.' See Spector and Cohen (n 6) 16. Gray also disputes

pre-emptive action to avert non-imminent threats is, in fact, limited. There is no evidence of the *opinio juris* needed to alter customary international law so as to permit pre-emptive self-defence. As discussed in part IV, this lack of *opinio juris* is highlighted by Israel's failure to offer any legal justification for its use of force, and by the lack of international endorsement of the legality of that action. In addition, broader state practice since the promulgation of the Bush doctrine indicates that there is currently very little support for the notion of pre-emptive self-defence.[128] Consequently, without additional evidence demonstrating clear endorsement of the *legal* basis of the Israeli airstrike, the Al-Kibar incident cannot be regarded as modifying the customary international law right of self-defence so as to include the use of pre-emptive force against non-imminent threats.

While the direct or immediate impact of Al-Kibar on the scope of the right of self-defence is therefore relatively minor, the international community's failure to condemn Israel raises broader issues about states' perceptions of the legitimacy of the *jus ad bellum*.[129] A key question, first posed by Rosayln Higgins in 1994 but even more pertinent in the current 'war on terror' era, is whether states are moving towards the conclusion that:

> the failure of the international system, coupled with fundamentally changed circumstances since the time when the relevant [use of force] texts were agreed, makes preferable unilateral action for the common good even if it is at variance with the norms articulated in the Charter and elsewhere.[130]

To date only the US and Israel seem prepared to express such a view openly. However, the international community's failure to condemn the Israeli airstrike on Al-Kibar raises the possibility that this line of thinking may also be taking hold among other states.

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the extent to which the incident should be regarded as evidence of growing support for the Bush doctrine. See Gray (n 6) 126.

[128] Gray (n 6) 126. See also discussion in part III.

[129] 'Legitimacy' is used here to refer to the normative authority or validity of a particular rule, in the sense that states perceive that rule to be relevant and binding. See Andrew Hurrell, 'Legitimacy and the Use of Force: Can the Circle be Squared?' (2005) 31 Review of International Studies 15. On recent debate over the legitimacy of the *jus ad bellum*, see, for example, Michael J Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* (Palgrave 2001); Tom J Farer, 'The Prospect for International Law and Order in the Wake of Iraq' (2003) 97 AJIL 621; Michael J Glennon 'How International Rules Die' (2004-2005) 93 Georgetown Law Journal 939; Thomas Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 AJIL 88.

[130] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon, Oxford 1994) 252.

Though it is still too early to reach firm conclusions, two features of recent state practice suggest a possible shift in states' perceptions of the legitimacy of the *jus ad bellum*. The first is a trend identified by Gray:[131] the growing tendency of states to refrain from offering any legal justification for their use of force, or to disregard the reporting requirement in Article 51 of the Charter. [132] This is evident in Israel's failure to provide a legal argument in support of its airstrike on Al-Kibar, and also in several other recent incidents in which states declined to report their use of force to the Security Council, or failed to offer any legal justification for their action. Gray refers to two such episodes:[133] Ethiopia's intervention in Somalia[134] in 2006, and Turkey's 2006-2008 incursions into Iraqi territory which targeted the PKK (Kurdistan Workers' Party).[135] In the former case, Ethiopia did claim to be acting in self-defence but nonetheless failed to report its use of force to the Security Council, while in the latter situation, Turkey did not provide an explicit legal justification for its actions. More recent examples of similar practice can be seen in a series of Israeli airstrikes in Sudan in January and February 2009, which reportedly targeted weapons convoys heading for the Gaza Strip.[136] As it had done following the Al-Kibar incident, Israel hinted that it was responsible for the Sudan attacks but refused to provide details of its military operations or offer any legal justification for its use of force.[137]

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[131] Gray (n 6) 113-14.

[132] Article 51 of the UN Charter provides that '[m]easures taken by members in the exercise of this right of self-defence shall immediately be reported to the Security Council'. The reporting requirement under Article 51 of the Charter is procedural but according to the ICJ 'the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence': *Nicaragua Case* (n 48) para 200.

[133] Gray (n 6) 116-17.

[134] On the Ethiopian intervention in Somalia, see Awol K Allo, 'Ethiopia's Armed Intervention in Somalia: The Legality of Self-Defense in Response to the Threat of Terrorism' (2010) 39 Denver Journal of International Law and Policy 139.

[135] On Turkey's incursions into Northern Iraq, see Tom Ruys, '*Quo Vadit Jus ad Bellum*?: A Legal Analysis of Turkey's Military Operations Against the PKK in Northern Iraq' (2008) 9 Melbourne Journal of International Law 334.

[136] Uzi Mahnaimi, 'Israeli drones destroy rocket-smuggling convoys in Sudan' *Sunday Times* (London, 29 March 2009) 11.

[137] The Sunday Times reported that, '[i]n a phrase that every Israeli recognised as a claim of responsibility for the raid, Israel's outgoing prime minister, Ehud Olmert, declared last week: "We operate in every area where terrorist infrastructures can be struck. We are operating in locations near and far, and attack in a way that

These recent episodes suggest that states using force may feel there is now less need to assert a legal justification for military action.[138] This apparent downgrading of the role of international law in discussions over the use of force is a new development. As recently as 2006 Franck demonstrated that in most circumstances states continue to offer at least *some* legal justification to support their use of force.[139] While those justifications have often encompassed questionable interpretations of either fact or law, or both, the provision of legal arguments is significant because it represents an attempt to situate conduct within the normative framework for the use of force.[140] In other words, offering legal justifications for military action implies recognition by states that the *jus ad bellum* is legitimate and binding.[141]

As noted by the ICJ, the effect of providing legal justifications to excuse violations of international law is to strengthen the rule in question:

> If a state acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[142]

However, if a state makes no attempt to offer a legal justification for conduct which breaches international law the integrity of the law comes under threat. By failing to provide legal arguments a state is inferring that they do not regard a particular law as sufficiently important to require a legal justification, or that they do not consider that law to be binding at all. In both circumstances, the authority of the norm in question may suffer. In this regard, the failure to offer legal justifications for the Al-Kibar airstrike and other recent incidents mentioned above could suggest a declining belief in the legitimacy of the *jus ad bellum*.

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strengthens and increases deterrence. There is no point in elaborating. Everyone can use their imagination. Whoever needs to know, knows."' ibid.

[138] Gray (n 6) 111.

[139] Franck (n 129) 95-98.

[140] ibid 96-97.

[141] ibid.

[142] *Nicaragua Case* (n 48) para 186.

That conclusion receives support from a second feature of recent state practice: the reluctance of the international community to condemn breaches of international law such as Israel's airstrike on Al-Kibar. This apparent indifference towards the legality of military action was noted by Mohammed ElBaradei, then head of the IAEA, who stated after Al-Kibar that he was 'horrified by how little protest the military action in Syria has triggered.'[143] In addition to Al-Kibar, the international community showed a similar lack of concern over the legality of Ethiopia's 2006 intervention in Somalia,[144] Turkey's 2006-2008 incursions into Iraq[145] and Israel's 2009 airstrikes in Sudan.

Although it is true that since the end of the Cold War states have become less inclined to automatically condemn the actions of other states, these recent examples of reluctance to protest against unlawful uses of force appear to reflect a growing disregard for the *jus ad bellum*.[146] This development – like the failure of states to offer legal justifications for their use of force - has the potential to undermine the legitimacy of the law. As Franck recognises, 'if the community of states fails to register its displeasure with the law's violation in some significant fashion, it would be arguable that the norm is being allowed to lapse into meaningless.'[147]

Clearly, a lack of international protest against a *major* violation of the prohibition on the use of force is more damaging to the legitimacy of the *jus ad bellum* than a failure to criticise a more minor incident. In this regard, the absence of criticism of Al-Kibar and other relatively limited uses of force should not be taken as evidence that the international community has abandoned all concern for compliance with the law on the use of force. On the contrary, major conflicts are likely to continue to attract significant international

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[143] '"If We Fail, Humanity's Survival Will Be on the Line": Interview with Mohammed ElBaradei', (*Spiegel International*, 11 June 2008) <http://www.spiegel.de/international/world/0,1518,559085,00.html> accessed 26 November 2010.

[144] Allo observes that 'most states have failed to question the legality of the [Ethiopia-Somalia] war or require a debate in the Security Council or elsewhere'. Allo (n 134) 167.

[145] Ruys refers to the 'generally muted reactions of third states'. See Ruys (n 135) 244.

[146] This post-Cold War change in state practice is noted by Gray. See Gray (n 44) 244.

[147] Franck (n 129) 96.

discussion of the legality of use of force. However, in relation to smaller incidents the international community seems to have become more tolerant of breaches of Article 2(4).[148]

This apparent willingness to tolerate less serious uses of force appears to be one of the political consequences of the amorphous concept that is the 'war on terror'. The Al-Kibar incident, plus the Ethiopia-Somalia intervention, Turkey-PKK episodes and the Israel-Sudan airstrikes are all situations which have been linked in some way to the need to combat terrorism or prevent the proliferation of weapons of mass destruction. It appears that when a state using force brings a particular incident under the 'war on terror' banner the international community may be less inclined to scrutinise the legality of that use of force.

An increased tolerance of the unilateral use of force carries significant risks. As well as undermining the integrity of the prohibition on the use of force it has the potential to influence states' decision-making with regard to military action. As Gray argues, the international community's failure to respond strongly to Al-Kibar and other recent incidents 'creates the risk that a state wishing to undertake pre-emptive action to prevent the proliferation of nuclear weapons will now believe itself less likely to meet a hostile international response'.[149] That risk is most apparent in relation to the ongoing impasse over Iran's nuclear program.[150] A number of states, including Israel, the US, the UK and France have raised the possibility of using pre-emptive force to prevent Iran from developing nuclear weapons capabilities.[151] While there are several important factual differences between the Al-Kibar situation and the Iranian nuclear issue – most notably the Security Council's involvement in the latter case – the lack of criticism of Israel's airstrike on

[148] It remains to be seen whether this will become a long-term feature of state practice or a short-lived trend.

[149] Gray (n 6) 126.

[150] On Security Council action on the Iranian nuclear issue see UN SC Res 1696 (31 July 2006), UN SC Res 1737 (23 December 2006), UN SC Res 1747 (24 March 2007), UN SC Res 1803 (3 March 2008), UN SC Res 1835 (27 September 2008), UN Res 1929 (9 June 2010).

[151] On a possible pre-emptive strike against Iran's nuclear facilities, see, for example, Gregory Maggs, 'How the United States Might Justify a Preemptive Strike on a Rogue Nation's Nuclear Weapon Facilities Under the UN Charter' (2007) 57 Syracuse Law Review 465; Mary Ellen O'Connell and Maria Alevras-Chen, 'Ban on the Bomb – and Bombing: Iran, the US and the International Law of Self-Defense' (2007) 57 Syracuse Law Review 497; Behnam Gharagozli, 'War of Words or a Regional Disaster? The (Il)Legality of Israeli and Iranian Military Options' (2010) 33 Hastings International and Comparative Law Review 203.

Al-Kibar might be perceived as paving the way politically for an attack on Iran.[152] In this regard, the Al-Kibar episode may prove to be more significant in terms of its political implications than its direct or immediate impact on the *jus ad bellum*.

VI. CONCLUSION

Israel's airstrike on Al-Kibar represents an unusual episode in the recent history of incidents involving the use of force. The international community's reluctance to discuss the matter means it is difficult to provide definitive statements on the normative impact of Al-Kibar. Further insight is needed into the reasons for other states' failure to criticise Israel's action and into broader international attitudes to unilateral pre-emptive force.

A number of conclusions can, however, be reached. First, while international law at the time of the Al-Kibar incident recognised a right of anticipatory self-defence against imminent threats it did not permit the use of pre-emptive force against more remote, non-imminent threats. Second, Israel's airstrike on Al-Kibar was not a response to a threat of imminent attack, and therefore, did not fall within the scope of the right of anticipatory self-defence. It must be considered an unlawful use of force in violation of Article 2(4) of the UN Charter. Third, the international community's failure to condemn this breach of international law is more likely to represent political support for Israel's action, rather than acquiescence in the legality of that use of force. Fourth, in the absence of an explicit legal justification by Israel and a lack of endorsement of the legality of the airstrike by other states, it is difficult to identify any evidence of *opinio juris* for an expanded customary international law right of self-defence that would permit the use of pre-emptive force against non-imminent threats. In that regard, Al-Kibar's immediate impact on the *jus ad bellum* seems to be limited. Finally, Israel's failure to offer any legal justification for its airstrike, and the muted international reaction to the Al-Kibar episode, appear to be part of a recent trend in state practice indicating a broader lack of concern over the legality of relatively minor uses of force.

[152] Spector and Cohen (n 6) 20.

This final development is perhaps the most significant. It suggests that in the context of the 'war on terror' and associated concerns over the effectiveness of the current non-proliferation regime, the international community may now be more willing to tolerate unilateral uses of force, at least as far as minor incidents are concerned.[153] Such tolerance, coupled with an apparent downgrading of the role of international law in discussions over the use of force, may reflect a decreasing perception of the legitimacy of this fundamental area of law. In addition, the international community's failure to protest against breaches of the *jus ad bellum* may contribute to a political climate in which states feel less constrained by the requirements of international law, potentially increasing the possibility of military action. Given Franck's warning that:

> every recourse to force, in the modern world of global interdependence, always affects the condition and well-being of many more states than merely the initiator and the object of a military action… and, in particular, the integrity of the international system of rules and procedures[154]

a possible increase in the propensity for military action is a worrying prospect.

[153] Spector and Cohen (n 6) 20.
[154] Franck (n 129) 105.